THE ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1970, c. 318, as amended

IN THE MATTER OF: the complaint of Ms. Kathy Hartling of St. Catharines, Ontario, that she was discriminated against in employment by reason of being refused referral or recruitment for employment or refused employment by the Timmins Police Force, Board of Commissioners of Police, City of Timmins, Chief Floyd Schwantz and their servants and agents, Timmins, Ontario, contrary to paragraphs 4(1)(a) and/or (b) of the Ontario Human Rights Code, as amended.

APPEARANCES: Messrs. Allan Millward and Derek D'Oliveira, Counsel for the Ontario Human Rights Commission and Ms. Kathy Hartling.

Mr. Rino Bragagnolo, Q.C., Counsel for the Respondents

A HEARING BEFORE: Peter A. Cumming, a Board of Inquiry in the above matter appointed by the Minister of Labour, the Honourable Robert Elgie, October 22, 1980, to hear and decide the complaint.

DECISION AND ORDER

The Issue

The Complainant in the hearing before this Board of Inquiry, Ms. Kathy Hartling, of Schumacher, Ontario, alleged in her Complaint (Exhibit #3) and amended Complaint (Exhibit #7) that she was discriminated against on the basis of her sex, as prohibited by paragraphs 4(1)(a) and/or 4(1)(b) of the Ontario Human Rights Code, which read:

> "no person shall...
>
> (a) refuse to refer or to recruit any person for employment; or...
>
> (b) dismiss or refuse to employ or to continue to employ any person,
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> because of...sex...of such person or employee."

The Evidence as to the Factual Situation related to the Complaint

The complainant alleges that in July, 1977, she sought employment with the Timmins, Ontario, Police Force, at which time, she says, she attended at the police station and the desk sargeant, Sargeant Leonard Kathen, a neighbour friend of her family, told her the force did not hire women, but that she might apply to be a meter maid. (Transcript, pp. 12) She was then 20 years of age, 5 feet 8 3/4 inches and some 185 pounds, (Transcript, pp. 11) all of which statistics met the minimum requirements imposed by the Board of Police Commissioners for consideration for employment as a police constable with the Timmins Police Force. (Transcript, pp. 132)

I have no doubt about her testimony in this regard. Indeed, Sargeant Kathen, who retired October 1, 1977, quite frankly testified that while he could not recollect what he specifically said to Ms. Hartling on the occasion, that he might well have said the force did not hire women. (Transcript, pp. 163) However, he was certain that there was not a formal policy against hiring women on the part of the Board of Police Commissioners. (Transcript, pp. 164, 167) In any event, given "that the desk sargeant and police chief were near retirement", (Exhibit #7) the Complainant said she "decided to wait until there was a new police chief". Therefore, the Complainant did nothing further to pursue her possible employment by the force until August, 1978.

Chief Perreault was Police Chief of the Timmins Police Force until May, 1978. He was not a named Respondent in the complaint. The new Chief of the Timmins Police Force as of May, 1978, Chief Floyd Schwantz, a named Respondent, cannot be held responsible in any way for the 1977 recruitment policy of the Timmins Police Force, as he had no connection with the police force until May, 1978.

The "Timmins Police Force", another named Respondent, is not a legal entity, and therefore, is not, in my view, a proper respondent to the complaint.

Finally, the third named Respondent, the Board of Commissioners of Police, City of Timmins, is a continuing legal entity and is a proper Respondent in so far as both the 1977 incident, and the 1978 incidents which give rise to the subject of the Complaint. However, although I accept Ms. Hartling's evidence as to the 1977 conversation with the desk sargeant, Ms. Hartling did nothing further to pursue the possibility of employment with the Police Force, at that time and accordingly, if I were considering only the 1977 incident, that limited incident might be insufficient to support a complaint.

Counsel for the Respondents argued that the 1977 incident could not (1) be the basis of a complaint due to the limitation of actions period set forth in s. 11 of the Police Act; and (2) that assuming this incident could not give rise to a complaint due to such limitation of actions period, the incident was not properly admissable as evidence with respect to a hearing on the Complaint based upon the 1978 incidents.

I shall deal with both these points.

In my view, whether or not the 1977 incident was barred as a basis for a Complaint, due to a statutory limitation of actions period,[1] it was relevant evidence to evaluate the 1978 incidents, and, therefore, properly admissable as evidence. However, my findings of fact with respect to events subsequent to 1977 have not been influenced in any way by what happened

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[1] See generally, Metropolitan Toronto Board of Police Commissioners et al and Ontario Human Rights Commission et al. (1979) 27 O.R. (2d) 48 (Div. Ct.)

when Ms. Hartling approached the Police Force for recruitment in 1977. I find the 1977 incident to have been so preliminary in nature that it just does not mean all that much. Moreover, what happened in 1977 was independent of Chief Schwantz who was not a member of the force until he became Chief in May, 1978. My findings of fact with respect to events subsequent to 1977 stand on their own, and are not in any way dependent upon, or influenced,by, the 1977 incident.

Ms. Hartling, now of St. Catharines, Ontario, had been a resident of Schumacher, Ontario (about one-half a mile from Timmins) for most of her life. She has completed her Grade XII (Exhibit #4) plus a one year diploma program (Exhibit #5) on "Law and Security Administration", at St. Clair Community College, Windsor. She took this program, on the recommendation of her high school Guidance Counsellor, as she thought it would be an advantage in obtaining a job with the police force. She has an obvious and sincere desire to be a police constable.

Ms. Hartling obtained and submitted a completed application (Exhibit #10) to be appointed a police constable with the Timmins police force in August, 1978. In fact, she testified she returned the completed application to Chief Schwantz personally. (Transcript, pp. 17, 18, 19) As she did not receive any response, and was anxious she went to the then Mayor of Timmins, Michael Doody, who was one of the two members of the Board of Police Commissioners in October,

1978, explained that she had applied but had not heard anything, expressed her concern about whether she would be considered as she was a woman, and was assured by Mayor Doody that a qualified woman would be hired, and that he would make sure she was contacted shortly. (Transcript, pp. 20, 21) As she did not hear further, she again sought Mayor Doody's assistance about ten days later, and he again assured her she would be contacted shortly.

Shortly thereafter, having been contacted by Mayor Doody, Chief Schwantz telephoned her and asked her to come in for an interview at the police station. There is no real dispute as between Chief Schwantz and Ms. Hartling about what was said at the interview which lasted some fifteen to twenty minutes. Chief Schwantz criticized her spelling, (Transcript, pp. 22) went over her marks, asked why she thought she would be an asset to the police force, and suggested the force could not bear the cost to extend the building for a new change room and washroom to accommodate a female constable. Chief Schwantz then stated that he considered Ms. Hartling's communication skills were not adequate for a police constable (Transcript, pp. 23). She said that the Chief never stated what qualifications were required. Chief Schwarntz's later testimony did not dispute her testimony about his interview with her.

Ms. Hartling had no further contact with the police force, thinking, quite correctly, that her application had been rejected, and some time later, about March 19, 1979, commenced work in a sporting goods store.

Ms. Hartling also applied to the Ontario Provincial Police for employment as a police constable in 1978 and 1979, but was unsuccessful on the exam she wrote. (Transcript pp. 38, 39).

However, she read an article with the heading "Investment in Women Officers is Poor One", (Exhibit #6), in the Timmins newspaper, The Timmins Daily Press, of November 29, 1979 and a subsequent Editorial of December 2, 1979, and as a result wrote a letter to the newspaper (Exhibit #8) printed December 7 or 8. Chief Schwantz also wrote a letter to the newspaper (Exhibit #9). The article, and letters, all referred to a public meeting of the Timmins Ratepayers Association, at which Chief Schwantz spoke.

Peter Black, a reporter with the Timmins Daily Press from September, 1977 to August, 1979, wrote the newspaper article of November 29, 1978, (Exhibit #6) following the Ratepayers' Association meeting at which he took notes which formed the basis of the article. Mr. Black testified that Chief Schwantz spoke for about 20 minutes and there was then a question and answer period.

Mr. Black testified:

"A. Yes he was asked by uh.. one question to the effect what he believed his policies to be as far as hiring woman for police work. [NOTE BELOW]

Q. What was his response to that?

A. He said that he didn't believe that woman were particularly suited for police work.

Q. Did he elaborate on that?

A. He gave several reasons as I recall - there was, he said woman were likely to follow their husbands in whatever career moves that their husband might make. He mentioned that woman might be unwilling to work weekends, shiftwork, especially keeping woman there might be a problem keeping woman on the Police force a length of time long enough to ensure that they are - reach standards of competence. He mentioned the problem of woman becoming pregnant, that this might disrupt a smooth employment flow, attirements, he said at one point I believe that .... there is a problem of altering uniforms for woman as they change size because of pregnancy." (Transcript, pp. 66)

Exhibit #6 reads:

"INVESTMENT IN WOMEN OFFICERS IS POOR ONE"

"From a practical aspect, hiring a policewoman simply does not make sense," Timmins Police Force Chief Floyd Schwantz told last night's annual meeting of the City of Timmins Rate-payer's Association.

The chief was responding to a question on his views on the hiring of policewomen.

He stressed that he didn't want his remarks to be interpreted as being "anti-policewoman" and said he knew he would be "castigated in the press" for his views.

His views are "not based on discrimination, but on practical considerations," Chief Schwantz said.

Females are unsuitable for police work for several reasons, Chief Schwantz said.

He says that basically women are not a good investment for a police department because they are prone to leaving the job, thereby wasting the money and time involved in their training.

Note: The word "women", as used by this and other witnesses is generally mispelled in the Transcript as "woman".

He says women will invariably follow their husbands wherever his job may lead him and leave the force short of manpower. Women also will want weekends off to be with their husbands, the chief said, causing shift scheduling problems.

He said that women, unlike men, get pregnant and it makes it difficult for a police department to continue their employment.

"We can't afford to keep changing the size of their uniforms," the chief joked.

Chief Schwantz said that he could see the possible use of women in such police force work as childrens' services.

He said it takes at least five years of training and duty before he considers a policeman top notch, and women aren't likely to stay on the job long enough to reach that level."

Exhibit #9 reads:

"CHIEF SAYS NO DISCRIMINATION
IN FORCE'S HIRING PRACTICES

Sir: The article appearing in your paper on November 29th, 1978, reported quite accurately some of the comments made by me when addressing the City of Timmins Ratepayers Association (COTRA).

I would like to set the record straight. I was speaking of PRACTICAL considerations, a subject I am sure is of interest to most taxpayers.

The same consideration for PRACTICAL matters is exercised, and will be exercised in every matter that comes to my attention during my service to the community.

This is true for all applicants for service with the force, both male and female.

The policy of the force with respect to hiring, and which I support without reservation, is simply stated in that all applications will be received without regard for race, creed, color or sex. I did not suggest in my talk to COTRA that females or males were superior performers in any capacity.

> Sir, your editorial which appeared in response to my remarks, dealt with matters which were not a part of my address, and may have been read by the public as remarks contained in my talk.
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> As an example, "the male officer being concerned for his personal protection because a police woman was backing him up." This subject was not a part of my remarks.
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> If the public has received an erroneous idea of my remarks, I first of all wish to apologize for leaving such an impression, and secondly to state clearly that my remarks were made to explain PRACTICAL concerns, and did not refer to ability or lack of ability by either sex.
>
> Floyd N. Schwantz
> Chief of Police"

As well, on January 9, 1979, Mr. Black attended the Board of Police Commissioners meeting, which was the first or second meeting of the Board of Police Commissioners that was open to the public. Discussion at the meeting made mention that there were some 100 applicants for four positions as constables with three women amongst the applicants. (Transcript, pp. 68) Mr. Black published an article January 10, referring to the meeting (Exhibit #12), which reads:

"OVER 100 APPLICATIONS FOR 4 FORCE POSITIONS"

> Timmins Police Commission has received over 100 applications, three from women, for the four positions open on the Timmins Police Force.
>
> Police Chief Floyd Schwantz told a public meeting of the commission yesterday that four male potential candidates have made it through the force's grid for determining suitability. Two of the potential new constables are city residents, one from Red Lake and another being considered is now on the Metropolitan Toronto Police Force. Authorized strength of the force is 71 and there are 67 uniformed members at present.

> Chief Schwantz outlined for commission members Mayor Mike Doody and Wyman Brewer the procedure an applicant must go through in order to make it to the final selection stage.
>
> He said all applications are reviewed for an intial profile of the candidate. The force then does a background check on their personal suitability, contacting neighbours or other persons they are acquainted with as well as previous employers.
>
> Those that make it past that stage are then subjected to a personal interview with a selection board composed of two staff sergeants and two inspectors. After that the candidate has a medical checkup.
>
> The chief told the meeting that the candidate now on the Toronto force is "in the wings" pending the outcome of an assault charge against the individual resulting from an arrest he had made.
>
> He said he had been reassured by the officer's superiors that the court case would exonerate the officer and prove that the charge against him was a "vindictive one".
>
> The candidates for hiring were to be discussed at an in-camera meeting following yesterday's public session of the commission."

Mr. Black impressed me as a competent, conscientious, objective reporter and I have no doubt that his newspaper articles were accurate. Indeed, Chief Schwantz candidly admitted the accuracy of the November 29 article, (Exhibit #6) in his detailed cross-examination. (Transcript, pp. 219 to 221)

Mr. Glen Gillis, a news reporter with C.K.S.O. television station in Timmins also attended the ratepayer's meeting in his capacity as a reporter. He testified, referring to the notes (Exhibit #15) he made at the time:

"A. Um....the question was brought up by a person as to why there were no woman constables on the force and the person said couldn't they be used in various cases in

only been in Timmins for six months and he said our lack of woman may look discriminatory but my opinion is based on practicalities. Most woman do what there husbands want and go where they go. Um...then he made a reference what if the husband moves after all the training that a woman officer might go through he said the Timmins force is the one who loses, and he was speaking in terms of time and money spent. He also made reference that woman . unlike men get pregnant and he said that if they were to come into my office pregnant I would have to send them home. He said unlike other jobs. He made reference to the fact that he wouldn't be able to send a pregnant woman out on an act of duty. Um....he added that since their husbands may work, they will want special consideration. However, he said that he does see the need for Police woman especially with children. Um... the Chief stressed that he was not anti-female but merely . speaking from a practical stand point from the Timmins point of view, saying he was Chief of the Timmins force. He said it does not make sense to hire woman , and that's pretty well the end of the remarks involving the hiring of female constables." (Transcript, pp. 79, 80)

He also wrote an article (Exhibit #13) under the heading "Policewomen Not Practical Chief Maintains" published in the November 30, 1978 Toronto Globe and Mail. The meeting was also reported in Northland Today issue of January, 1979 (Exhibit #14). I have no doubt that Mr. Gillis is also a competent, conscientious, objective reporter, and accept his evidence.

This was Chief Schwantz's first general meeting with the public. It was not simply a casual interview or meeting. Rather, he was laying down for the City of Timmins what his views and the hiring policy were, or at least, reasonable people would infer that was what he was doing. Chief Schwantz was setting forth what the recruitment policy in fact was at the time of Ms. Hartling's application.

Ms. Gilda Mahon, an elementary school teacher, also testified. As an interested citizen, she wrote a letter to the editor (Exhibit #16), published in the Timmins Daily Press with another letter to Chief Schwantz, critical of his position on hiring women as reported in the newspaper, and

seeking reasons for his position. The Chief telephoned her, and they had a meeting at the Police Station in December, 1978, at which she took notes. (Exhibit #17) She testified:

> A. Alright. I reserved any comment that I had until the end that was sort of agreed upon. His first comment to me was with reference to maternity and maternity leaves and being pregnant. I had asked him just likely to tell me why he felt woman were not suited to police work and his first reason was the fact that they could get pregnant and he did not feel that he wanted to take the responsibility for any problem that might be incurred to the unborn fetus etc. while the woman was still on duty. He also stated that to the best of my recollection is that once a woman did have her children she would want to stay home, would want week-ends off and would certainly not want to work shift work particularly on cold February nights etc. His second comment to me was that un... woman who married would probably want to leave the area if the husband's job took him elsewhere and he felt that the turnover in the station at that point was quite comfortable and he felt that with more woman that the turnover would be much greater although he didn't have any statistics to back it up atthat point. (Transcript, pp. 114)
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> ...
>
> A. Alright. The next comment that he made was with regards to scheduling vacations to correspond with that of their husband's; he pointed out that in the last job that he had from whereever he came and I can't remember what the Cities name was that he spent alot of time and effort on trying to get vacations to correspondend for the woman in his office. I assume he meant secretarial, that I really don't know, or at least I can't remember whether he meant police woman but he said that that would be quite an administrative hassle. He assumed that the woman who would be employed would want vacations at the same time as their husband's and the final reason he gave was the fact that there weren't any washrooms or changerooms for any women that he would employ as police officers and that that would be a costly venture to the tax payers and that had to be one of his considerations. (Transcript, pp. 114, 115)

At the conclusion of this unusual interview, (with a reversal of roles from that of the usual, for both citizen and police officer) she read her notes to him and he indicated approval. (Transcript, pp. 113, 115)

Mrs. Mahon then put some compelling arguments to Chief Schwantz:

> "I pointed out that out of a career say 40 years, 2 years or 3 years bearing children certainly was not a large portion of that time and I felt that just the fact that a woman was a mother didn't necessarily mean that she was going to suddenly expect to not have shift-work and that was not exactly a surprise when she hired on with the force she would simply have to take shift-work like everybody else. Then of course, everybody would rather be home with their families on cold February nights and certainly not just woman with their children. As far as mobility was concerned I pointed out the fact that a woman's income was certainly a large consideration in any economic situation in a marriage and that because he didn't have any statistics to really show me conclusively that woman simply would not last for five years to make them a good financial risk to the community. I just didn't feel that that was a good reason for not feeling that they were suited to police work. I said that it was very nice of him to schedule vacations etc. for the woman in his employ where he workedbefore but that was something he took on himself, it was a responsibility that he chose to take not one that was requested, then it was not part of a woman's expectations that vacations would be made to suit her that she simply would have to do it in any other way that his male counterpart would and he agreed with me and as far as washrooms and changerooms were concerned I questioned him as to whether all of the police officers came into change in the morning or whenever their duty was and he said no that many did come in uniform and I asked if they all came back to use the washroom and he said no of course not that they would use whatever washrooms that is close by. I also pointed out that un...his statement that woman were not suited to police work was uh..based on his own personal opinion and that a man in his position really didn't have, I felt, the right to say things like that because we need a lot more role models for our young women in school. Anyway he said that he didn't in any way suggest that anyone could not apply to become a police officer. That application forms were available to anyone in the Community or elsewhere and I said I agreed with that and he could not uh..of course deny that to anybody but I pointed out I used Italians only because I am Italian

> but I remember saying to him quite distinctly that if he turned around and said that all Italians weren't suited to police work but they could apply if they wanted that it really was not exactly an invitation to Italians to apply and I felt that he was doing the same thing to woman. He said he didn't realize that his statement was misinterpreted, he didn't un... think that it would be misinterpreted and I suggested that it certainly was." (Transcript, pp. 116, 117)

Ms. Mahon testified that Chief Schwantz did not disagree with her point that his public statement at the ratepayers' meeting was being interpreted as indicating female applicants would not really be considered on their merits. Moreover, in his cross-examination during the Inquiry, Chief Schwantz agreed with Ms. Mahon's testimony (Transcript, pp. 225) and confirmed that he told Mrs. Mahon the problems he perceived pertaining to shift work, staff holidays, and washroom facilities if there were female police constables. (Transcript, pp. 240) From his own evidence, it is clear Chief Schwantz had no intention of hiring a woman as a police constable at the time he interviewed Ms. Hartling.

Mr. Wynan Brewer has been Chairman of the Board of Police Commissioners since 1976 or 1977 and a Commissioner since 1972. (Transcript, pp. 169)

He stated that he questioned Chief Schwantz and Superintendent Stevens about the Hartling application, given the newspaper controversy, and assured himself she was not qualified, and in fact had received more than the average consideration. It is obvious this conversation with the

Chief was not until December, 1978. Mr. Brewer was defensive in cross-examination, and obviously had very little information about Ms. Hartling. He knew, or certainly should have known, that no test was given to her. He confirmed in his testimony that there were probably vacancies when she applied. Mr. Brewer's position was that the Board made no attempt to recruit women. Rather, they just recruited constables. One cannot take exception to this statement of policy, but it, of course, misses the essential point. Whether or not there is an affirmative action program is not the issue, and indeed, there is no requirement in law that there be an affirmative action program in favour of women in the hiring of police constables. No one is asking the Board to engage in tokenism as feared by Mr. Brewer. The issue simply is in hiring constables, are women discriminated against as prohibited by the Code?

Minutes of the meeting of the Board of Police Commissioners of September 18, 1978, were introduced into evidence (Exhibit #18) and "Item 12" refers to "Hiring Policy", stating (in what Chairman Brewer testified was a formal re-statement of existing policy) that the Board agreed that each application would be considered on its own merits. (Transcript, pp. 170, 171) Chairman Brewer testified that he first heard about Ms. Hartling from Mayor Doody, and spoke to the Chief and Superintendent Stevens and as a result assured himself "that there was no discrimination because of being female...(and) that

she was not qualified for the job...." (Transcript, pp. 172, 173). However, he did not really inquire into the specifics of the recruitment process with respect to Ms. Hartling, but rather just relied upon the opinion expressed by Superintendent Stevens and Chief Schwantz. (Transcript, pp. 176)

Similarly, it was clear from the testimony of both Chairman Brewer and Mayor Doody that the Board of Police Commissioners generally has rubber-stamped the recommendations for hiring new constables, as made by the Chief. (Transcript, pp. 179) The physical requirements (minimum of 5 feet 8 inches height and at least 160 pounds) were kept uniform for all applicants, although Mr. Brewer asserted these requirements were not a "rigid specification". (Transcript, pp. 181) Such uniform minimum standards, in themselves, have the effect of excluding women in a discriminatory fashion, and are, therefore unlawful. That is not the issue in the present Inquiry, as Ms. Hartling met such minimum standards. However, uniform, minimum standards as to height and weight are one indicator of a general policy of discriminating against female applicants for the position of police constable. Chief Schwantz at first asserted that so far as he was personally concerned there were no minimum height and weight standards (notwithstanding that was Board policy) (Transcript, pp. 212) but on cross-examination seemed to agree there were such standards but exceptions could be made. (Transcript, pp. 247)

Michael Doody, Mayor of Timmins, from 1977 to 1980, also testified. As Mayor, he was an ex officio member of the two person Board of Police Commissioners. He corroborated Ms. Hartling's testimony, that she had come to him in 1978 saying she had applied to the police force, was upset, and saying she felt there was a bias against her because she was a woman. (Transcript, pp. 130)

He subsequently spoke to the Chief about her (Transcript, pp. 153, 154). Mr. Doody testified that he believed that the recruitment process included a test which preceded any interview. (Transcript, pp. 134).

As to the controversy with respect to Chief Schwantz's comments at the ratepayers' meeting, Mr. Doody testified:

> A. Yes, I would say very candidly that it was the feeling of the members of the Police Commission that the Chief was speaking on behalf of the Chief and not on behalf of the Police Commission.
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> Q. Well why did you say that, what lead to that conclusion?
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> A. That I feel that it wasn't the Police Commission speaking or any member of the Police Commission. The Chief is not a member of the Police Commission, he is a person, a resource person to the Police Commission, I think that we were slightly upset over what was said. I think that it is the feeling of the Police Commission that should the Chief come in and recommend that we hire someone and it happens to be a woman that we hire to be taken on the force at the time, I think that the Timmins Police Commission would certainly have done so. (Transcript, pp. 142, 143)
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> ...
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> A. No I think after that particular incident it was made quite clear to the Chief that the Commission is the one that sets policy and that if someone met the standards that were put down, male or female, that we would be the Judge of that. (Transcript, pp.

Constable Angus Mortson of the Timmins police force also testified as a witness. He was recruited about September, 1977 and employed as of January 9, 1978. (Transcript, pp. 92, 93) His height, weight, and education were all less than Ms. Hartling, (Transcript pp. 87, 43) but he was hired as a constable after a 45 minute test followed by an interview. (Transcript, pp. 95) Constable Mortson was very forthright in his testimony, notwithstanding the awkward position he might feel himself in, in testifying.

There was much testimony about other constables being hired over the period, and indeed, Chief Schwantz testified he was looking for two or three constables in August, 1978. (Transcript, pp. 211) I find as fact that there were vacancies to be filled on the force when Ms. Hartling applied in August, 1978.

P.C. Andrew Bennett testified that he was hired as a constable September 11, 1978, and that two others were hired about the same time, and a further two in January, 1979. (Transcript, pp. 123, 124) Unlike Ms. Hartling, he too was given a written test before his interview (Transcript, pp. 125, 128). Mayor Doody also confirmed that the Board was looking to hire six or seven officers between the fall of 1978 and early 1979, and confirmed that applicants who met the physical and education requirements would be given a test, and then the Chief would select the preferred candidates and the Board would act on his recommendations. The Board really delegated recruitment responsibility to the Chief.

Chief Schwantz became Chief of Timmins Police Force in May, 1978, with an impressive previous record with the Kitchener, Georgetown and Halton Region Police Forces. (Transcript, pp. 194)

Chief Schwantz described the recruitment process, saying that all applications as received would be acknowledged in writing by Superintendent Stevens or Inspector Harris, but somehow, the Hartling application and others at the time were not so acknowledged. (Transcript, pp. 196, 197) Neither Superintendent Stevens nor Inspector Harris testified. He said that he first became aware of the Hartling application in response to Mayor Doody's inquiry: (Transcript, pp. 197). Chief Schwanz said that he found a number of spelling errors in the application, and, hence told Ms. Hartling at the subsequent interview that her communication skills were inadequate. (Transcript, pp. 199) He also found some of her grades at the "C" level in the Community College course to be inadequate in his opinion. (Transcript, pp. 200 to 203) However, she achieved at least a "C" (satisfactory") in each course, and it was clear on cross-examination that he did not really spend much time considering, or even understood, her grades. (Transcript, pp. 231)

Chief Schwantz also spoke to Ms. Hartling about some of the negative aspects of police work - "shiftwork, weekend work, stat-holiday work. . ." (Transcript, pp. 239) at the time of the interview.

Chief Schwantz tried to rationalize his remarks at the ratepayers meeting as being concerned about tax dollars and "practical considerations" (Transcript, pp. 209, 221, Exhibit #9, supra) and in any event emphasized they were his personal views rather than Board policy. (Transcript, pp. 210, 222, 224).

However, he acknowledged that he was appearing at the meeting in his capacity as Chief of Police, and stated his view as being that "from a practical point of view" women should not be on the police force". (Transcript, pp. 222)

Chief Schwantz asserted correctly that Ms. Hartling received consideration that no one else did, (Transcript, pp. 247, 248) because she was interviewed by the Chief of Police, but in the circumstances (she being a female), in my view, this was a disadvantage rather than an advantage.

Chairman Brewer maintained that Chief Schwantz's comments at the ratepayers' meeting were the Chief's own personal comments, and not Board policy. (Transcript, pp. 185) Even if they did not represent Board policy, given the Board's knowledge of the Chief's views, the recruitment process was fraught with peril for female applicants, particularly when the Board relied simply upon the Chief's recommendation in hiring. Chairman Brewer's inquiry of the Chief with respect to the Chief's rejection of the Hartling application came in the context of the newspaper controversy, and yet he did not really press the Chief for details, or

investigate at all (for example, he did not personally examine Ms. Hartling's application) (Transcript, pp. 186, 187, 190).

The Board of Police Commissioners knew, or certainly should have known if they were exercising their duties with the diligence of reasonable persons in their positions, that there was a problem in the actual recruitment process, whatever the formal, stated policy was. They knew, or should have known, that the recruitment process in actuality, as administered by Chief Schwantz, was discriminatory against women applicants. The Commissioners did not try to deal effectively with the problem. There was no rigorous investigation of the true situation in the face of the newspaper commentary. The Commissioners really deferred to the Chief's judgement, knowing the Chief did not want women constables. There was perfunctory, minimal supervision of the Chief. Whether Mr. Brewer agreed or not with the Chief (and I think, considering Mr. Doody's evidence that Mr. Doody disagreed with the Chief's discriminatory recruitment practices) the Board did not do anything at all to rectify the recruitment process. The Board tried to insulate itself from criticism, as evidenced by the "Hiring Policy" resolution (Exhibit #18), but it chose not to deal effectively with the problem, knowing there was a problem.

Chief Schwantz is undoubtedly a polite, conscientious, candid police officer who wants to do what he thinks best in achieving a competent and efficient police force for Timmins.

Chief Schwantz tried to rationalize his comments at the meeting with the ratepayers as emphasizing that he was concerned about the practical problems with respect to women constables. Undoubtedly, it was his honesty at the November 28 meeting that has caused him his problems. One may well not agree with his views, but cannot criticize his right to hold them, even perhaps to express them as a citizen, but he cannot act on those views as Police Chief in contravention of the Code. It is not enough for the Chief to assert that women have equal opportunity to apply, as the Code requires that females (as well as males) have their applications truly considered on the merits, and not arbitrarily on the basis of their sex.

Chief Schwantz assailed Ms. Hartling's communication skills, given her spelling errors. Certainly her spelling in the application was attrocious. Even the name of her high school was misspelled. One can only speculate as to whether the sad state of Ms. Hartling's spelling was a reflection upon her ability, or (as many parents would undoubtedly assert) the state of the public school educational system. However, considering all the evidence, I have no doubt that Chief Schwantz was rationalizing the rejection of Ms. Hartling as a prospective

police constable when he asserted it was on the basis of her communication skills. He rejected her, and I so find on the evidence, simply because she was a female. Her credentials on paper, coupled with his need at the time for officers, were such that he would have had the usual test administered to her before the interview if she had been a male applicant. The interview was really to placate the mayor, and the rejection on the basis of lack of communication skills was a facile, if plausible, means of dealing with the problem then confronted by the application. It may well be that Ms. Hartling would not do satisfactorily on the test, or even that her spelling problem (or obvious indifference in completing an application without at least having her spelling checked so as to put her application in the most favourable light) would be a factor in her ultimate rejection. But this communication problem was simply an excuse employed by Chief Schwantz, the real reason for her rejection being that she was a female applicant.

A subsidiary reason for her rejection as a candidate was also put forward by Chief Schwantz - that her reasons for termination of previous employment as set forth in the application were questionable. However, while her application is not all that clear on this point, in my view, and I so find, Chief Schwantz was really similarly using this reason for rejection as an excuse. In actuality, and I so find, he was rejecting her simply because she was a female. Even if there had been another reason for rejecting Ms. Hartling, the jurisprudence is clear that a Complainant is successful in

establishing a violation of the Code if one of the reasons for dismissal was a prohibited ground. The prohibited basis for dismissal must be a proximate cause but may be present with other proximate causes.[1]

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[1] Regina v. Bushnell (1974), 4 O.R. (2d) 238 (C.A.) I considered the law on this point in the recent decision, Mrs. Pearlina Reid v. Russelsteel Limited (May 19, 1981).

In the Bushnell case, an employee was dismissed for a number of reasons, only one of which was a prohibited ground under s. 110(3) of the Canada Labour Code, R.S.C. 1970, c. L-1, i.e. membership in a trade union. The Ontario Court of Appeal upheld the judgement of Hughes, J. to the effect that "union membership must be a proximate cause of dismissal, but it may be present with other proximate causes", (p. 290). In other words, regardless of other justifiable motives for dismissal, when the prohibited ground of union membership was present, s. 110 (3) of the Canada Labour Code applied. This decision has been cited with approval in other labour relations decisions, for example, Re Sheehan and Upper Lakes Shipping Ltd. 81 D.L.R. (3d) 208; Pipher v. Atlantic Bus Lines Inc. (1980) O.L.R.B. Rep. 154.

By analogy, the Bushnell decision has been considered in some decisions of the Ontario Human Rights Commission. In the case of Heather Hawkes v. Brown's Ornamental Iron Works (Dec. 12, 1977), Prof. D. A. Soberman considered the situation where an employee was dismissed partly on grounds of age (a prohibited ground under the Ontario Human Rights Code), and partly on other grounds. Prof. Soberman followed Bushnell and decided that if "age were present in the mind" of the employer, then the dismissal of Mrs. Hawkes was contrary to the Code.

That reasoning has been adopted, citing Bushnell as authority, in several subsequent decisions in respect of the Ontario Human Rights Code. In Sheila Robertson v. Metropolitan Investigation Security Ltd. (Aug. 10, 1979), I cited with approval Prof. Soberman's discussion of the Bushnell decision in Hawkes v. Brown. Similarly, in Jamie Bone v. Hamilton TigerCats (Aug. 16, 1979), Prof. John McCamus cited both Bushnell and Re Sheehan and Upper Lakes Shipping Ltd., supra, in deciding that where prohibited grounds are "motivating factors", then a violation of the Code has occurred, even though a number of other factors were also present.

In two more recent decisions, Prof. Soberman has cited Bushnell as the "leading decision" on the issue of Code violations in the presence of factors not covered by the Code: Skeete and Samuel v. Jolyn Jewellry Ltd. (June 23, 1980); Hetty Hendry v. L.C.B.O. (Aug. 5, 1980).

In summary, then, Bushnell holds that where one prohibited ground is present, even amongst other non-prohibited grounds, a violation has occurred. This has been approved in other labour relations decisions, and has been applied by analogy in decisions of Boards of Inquiry under the Ontario Human Rights Code.

There has obviously been some change in the hiring practices of Chief Schwantz since 1978, given the newspaper controversy (Exhibits #6 and #9) and Hartling application.

The application of another female was received in the summer of 1980, and was accepted in December 1980 and this person became the first female officer with the approximately 70 member Timmins police force. Moreover, physical changes to the police station were commenced in the summer of 1980 in anticipation, as Chief Schwantz put it, that "good (female) applicants would come forth." Undoubtedly, the mere fact of this Complaint has had a salutary effect in bringing the recruitment and hiring practice of the Timmins police force closer to the mainstream of police forces in Ontario, and closer to conformity with the Code. There was some evidence about the employment practice and procedures of other forces.

Deputy Chief Hubert Guillet of the Sudbury police force testified. His force has some 216 constables of whom eight are females. (Transcript, pp. 47, 48) He testified as to the Sudbury recruitment requirements and procedures. (Exhibit #11).

When Sudbury advertises for new recruits, the different height and weight requirements for female applicants are included in the advertisement. Basic requirements must be met as to age, height, weight and education. Assuming these standards are met, four basic tests (Exhibit #11) are given as to physical and mental ability, and investigation

is made, and assuming the applicant meets the standards imposed by such tests, an interview is given. (Transcript, pp. 52,53). This is the first point at which applicants are screened by a subjective evaluation on the part of the force. That is, to that point, applicants are screened out only if they do not meet the objective standards. This elaborate process of recruiting seems typical of forces of major municipal governments such as regional municipalities. (Transcript, pp. 59). However, Deputy Chief Guillet also testified that when he was with the smaller town of McKinnon (population about 22,000) police force from 1954 to 1960, a basic aptitude test was first administered to applicants for the position of police officer, the test being a standard one obtained through the Chiefs Association. (Transcript, pp. 62). Sudbury has a population of about 160,000 people, and Timmins about 44,000.

Inspector John Irwin of District Headquarters, Ontario Provincial Police, at South Porcupine, six miles from Timmins, also testified. Of the 136 uniformed personnel in the South Porcupine District, at present two are females, although in 1978 there were three. He described the O. P. P. recruitment process (Exhibit #19) as being, first, the completion of application and medical forms, second, a test (including a consideration of "spelling"), third, an interview, followed by a screening, fourth, a review of the test papers by a psychological consultant, and fifth, a final interview. (Transcript pp. 156, 157). The City of Timmins Board of Police Commissioners would be well advised to do a

practices, and therefore, the Board of Police Commissioners is itself in breach of paragraphs 4(1)(a) and (b) of the Code.

Chief Schwantz argued that his views were expressed without any malicious intent toward females, and I have no doubt of this. I have no doubt that he expressed the views he did because he honestly held them, and believes they are in the best interests of female applicants, the police force, and the City of Timmins. He is a frank and conscientious police chief.

As I stated in Sheila Robertson v. Metropolitan Investigation Security (Canada) Limited (Aug. 11, 1979 at p. 30), the legal principles in a 'discrimination on the basis of sex' Inquiry amount to the following propositions:

> First, the Complainant must show a prima facie case of discrimination as a result of the Respondent's employment or recruitment standards, requirements or conditions. Second, once it is shown that the employment or recruitment standards, requirements or conditions exclude a protected group under the human rights legislation, the onus then falls upon the Respondent to show that the standards, requirements, or conditions in question are job-related and that their absence would impose undue hardship on the conduct of the Respondent's business. Third, if the Respondent fails to discharge the onus, the requirements are considered discriminatory and illegal.

The Chief of Police rejected Ms. Hartling simply because he did not wish to have female police constables, as such positions have traditionally been occupied by males. This is an unlawful action, given the requirements of paragraphs 4(1)(a) and (b) of the Code. It is not open for the Chief, an employer, to decide that a prospective female employee should not take up an employment opportunity for which she is as

general review of the recruitment and hiring procedures of other forces, such as Sudbury and the O. P. P., with a view to reforming and improving upon that practised by the Timmins police force.

Summary of Findings of Fact and Application of Relevant Law

For the reasons given, I find the two Respondents, the Board of Commissioners of Police, City of Timmins, and Chief Floyd Schwantz were in breach of both paragraphs 4(1)(a) and 4(1)(b) of the Ontario Human Rights Code. The individual Respondent, Chief Schwantz, refused to refer or recruit the Complainant, Kathy Hartling, for employment as a police constable, contrary to paragraph 4(1)(a) of the Code and refused to employ the Complainant, Kathy Hartling, as a police constable contrary to paragraph 4(1)(b) of the Code, because she is a female person. The Respondent, the Board of Commissioners of Police, City of Timmins, is also in breach of these provisions of the Code for two reasons. First, Chief Schwantz was acting in the course of, and within the scope of, his employment with the Board in refusing to refer or to recruit for employment, or to employ the Complainant. He was acting on behalf of the Board in recruiting and hiring and the Board is therefore responsible for his breach of the Code. The Board did not really set up, or enforce, a rigorous system for recruitment with objective standards, but rather left hiring largely to the subjective evaluation of the Chief. Secondly, the Board knew, or most certainly should have known if it had performed its responsibilities with reasonable diligence, that Chief Schwantz was in breach of the Code in his recruitment

capable as a male, simply because the employer prefers a male for the position open. This is discrimination because of the applicant's sex. It is for the applicant alone to decide upon the suitability of the job, when there is no difference on a basis of gender in capability in performance of the task.

Chief Schwantz's position amounted to saying that because of his own values, a female was not as suitable as a male in the position of police constable. Once a *prima facie* case of discrimination is made out, to except himself from the impact of the *Code*, a respondent has the onus upon him to prove that discrimination on the basis of sex is a "*bona fide* occupational qualification and requirement for the position of employment" (s. 4(6) of the *Code*). This was not really even attempted in this hearing, and would undoubtedly have been unsuccessful in any event, as the evidence of both eminent social scientists and experienced, professional police officers on the subject is clear that a female is as capable as a male, all else being equal, in performing the tasks required of a police constable. (See the evidence of Dr. Joyce Sichel and former Toronto Police Chief Harold Adamson in *Colfer* v. *Ottawa Board of Commissioners of Police* and *Ottawa Police Chief Leo J. Seguin* (Jan. 12, 1979 at pp. 75 to 84).

The legal system has not always treated women in the same way men have been treated, sometimes to their advantage, sometimes to their detriment. Women have been required for too long a time to measure up to the prevailing standards of the male stereotype view as to what constitutes 'femininity'. The legislature of Ontario has spoken clearly in enacting the

Ontario Human Rights Code, as amended. An employer cannot refuse a woman consideration for employment simply because she is a female and the employer does not view the position as suitable for a female, when the job can be done just as well by a female person as by a male person. The law and the underlying values, have evolved quickly in a rapidly changing world, and the Respondents are obliged to recognize this, whatever the views and values of the Chief of Police and members of the Board of Police Commissioners.

Section 14C of the Code provides that after hearing a complaint a board shall decide whether or not any party has contravened the Code, and

> "(b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provisions or to make compensation therefor."

Given my finding of discrimination by the Respondents because of the Complainant's sex, I shall now review previous 'discrimination on the basis of sex' cases as to the remedies provided.

Remedies in Previous Discrimination on the Basis of Sex Cases.

The first sex discrimination case brought in Ontario appears to have been a complaint by female hospital aides against the Ontario Department of Health: Filiatrault v. Ontario Department of Health (1967). The complainants alleged

that male hospital employees were paid more for essentially the same duties as female aides carried out.

J. C. Anderson, J. found that, for certain individuals, the claim had been made out, and thus a violation of s. 5 of the Ontario Human Rights Code S.O. 1961-62, c. 93 had occurred.

Anderson, J. recommended that in the future female aides should be paid the same salary as male attendants where their duties are the same. No damages were awarded to the complainants.

A similar claim was dealt with the following year by Prof. (now Mr. Justice) Horace Krever: Mildred Fortey v. Middlesex Creamery Ltd. (June 22, 1968). Mrs. Fortey worked as an egg-grader for the respondent company. Her complaint alleged that although she performed identical duties to male workers and had more experience, she was paid a lower wage than males were. Prof. Krever found that s. 5(1) of the Ontario Human Rights Code (1961-62) had been breached by the respondent company. He ordered that the respondent pay to Mrs. Fortey a wage equal to that paid to male workers, retroactive to the time when the duties performed by male and female employees in the creamery became identical.

In Betty-Anne Shack v. London Driv-Ur-Self Ltd. (June 7th, 1974), the complainant alleged that the respondent company refused to give her an interview for a job vacancy because of her sex. The Board of Inquiry (Prof. Sidney Lederman) found that indeed the respondents had breached s. 4 of the Ontario Human Rights Code R.S.O. 1970, c. 318.

In deciding the matter of compensation, the Board found that even if the complainant had been interviewed, she would not have been hired. The respondent was looking for a permanent employee, whereas the complainant was prepared to work only for the summer.

The complainant was awarded $100.00 as compensation for the psychological injury she suffered in being discriminated against. The respondent was also ordered to send a letter of assurance to the Ontario Human Rights Commission of compliance with the Code. Further, the respondent was ordered to give notice to the Commission of any employment opportunities it had to offer, prior to public advertisement.

In one of only a few cases in which sexual discrimination has been found to have occurred against a male, a complainant was not permitted to apply for a job as a personnel manager since that position was normally held by a woman: Kerry Segrave v. Zeller's Ltd. (Sept. 22, 1975).

The Board of Inquiry ordered the respondent to treat men and women equally, and to amend its discriminatory interview materials, according to the scrutiny of the Ontario Human Rights Commission.

The complainant was granted a new interview by an independent personnel agency. Were he to be successful in the interview, the respondent would be obliged to hire the complainant and pay him compensation in the amount of $1250.00 for missed wages. A further $75.00 was ordered to be paid to

the complainant as general damages for personal distress and humiliation.

In Wm. Boyd v. Mar-Su Interior Decorators Ltd. (Feb. 22, 1978), a male was likewise found to have been discriminated against on the basis of sex. The complainant was denied the opportunity of applying for a position hanging drapes for the respondent company.

The Board of Inquiry (Prof. R. S. MacKay) ordered the respondent to write a letter of assurance to the Ontario Human Rights Commission of its compliance with the Code, and to give the Commission notice of its employment openings for one year. Further, the respondent was ordered to give access to Commission officers to inspect the respondent's premises, and to post a notice of its compliance with the Code.

The complainant was awarded $100.00 as general damages for the "cavalier treatment" that he received. Prof. MacKay refused, however, to grant damages for loss of employment, as such an award would be "too speculative".

The case of Ann Colfer v. Ottawa Police Commission (Jan. 12, 1979) involved the application of height and weight standards for police constables to female applicants. There, I found that the height and weight requirements of the Ottawa Police Commission had the effect of excluding virtually all women from employment as police officers.

Rather than award damages to Ms. Colfer, I found that the best remedy was to order the respondents to comply with the Code in general, and in particular, to permit the complainant's application to be properly considered.

Thus, the respondent was ordered to consider Ms. Colfer's application for employment without regard to the height and weight requirements previously adhered to. If the complainant were to be successful in her application, her name was to go ahead of others on the waiting list. The respondent was ordered to abandon its height and weight requirements, or to amend them by establishing different minimum height and weight requirements for male and female applicants such that men and women would receive equality of treatment and opportunity for employment.

In Kim Maguire v. Orchard Park Tavern (July 23, 1979), the respondent was found to have breached the Code by denying service to the complainant in a "Men Only" section of the tavern. The Board (Prof. D. A. Soberman) stated:

> Her (the complainant's) anger and annoyance seemed less concerned with the affront to herself personally than with women's rights more generally... Even so, it is important that a citizen who is aggrieved through interference with her human rights by the laws of Ontario be compensated appropriately. (pp. 9-10)

Prof. Soberman went on to order the respondent to pay $100.00 to the complainant. The amount was a "modest" one, since no substantial injury was suffered by the complainant.

The respondent was further ordered to send a letter to the Ontario Human Rights Commission undertaking to comply with the Code, to post a notice of compliance with the Code in a prominent place, and to permit inspection by the Commission of the respondent's premises.

In an employment situation, a complainant was not considered a candidate for a job as a security guard because of her sex: Sheila Robertson v. Metropolitan Investigation Security (Aug. 10, 1979). There, I found that a breach of the Code had indeed occurred and ordered that the respondent comply in the future with the Code. Such compliance was to be made evident in a letter of apology to the complainant, and in a letter of assurance of compliance to the Ontario Human Rights Commission. By way of compensation, I awarded $750.00 as general damages for the humiliation and pain suffered by the complainant.

In Betty Hendry v. Liquor Control Board of Ontario (Aug. 5, 1980), the complainant had been hired as a temporary part-time worker in a liquor store. She eventually was terminated, one of the grounds for which was her sex. As such, the Board (Prof. Soberman) found that a breach of s. 4(1)(b) of the Code had occurred.

The Board also found that the respondent had not seriously considered the complainant for full-time employment because of her sex. Prof. Soberman awarded Ms. Hendry $2,266.44 as compensation for wages lost as a result of her termination as a part-time employee.

With respect to the application for full-time employment, Prof. Soberman declined under the circumstances to order the L.C.B.O. to hire the complainant since there was no assurance that she would have been hired had her application been properly considered. Rather, he awarded the complainant $8,000.00 in general damages:

> As the solace available in these circumstances, both to make it clear to Ms. Hendry that her unfair treatment is recognized by this Board and to the L.C.B.O. that it must take very seriously the harm done by failure to abide by the Code, I would award Ms. Hendry the additional sum of $8,000.00 as general compensation.

The Board further ordered that the L.C.B.O. post Human Rights cards in all of its stores; that the L.C.B.O. take steps to reduce the imbalance between men and women employees; that the L.C.B.O. submit information to the Commission such that the L.C.B.O.'s employment practices may be monitored for one year; and that the L.C.B.O. send a letter of apology to the complainant.

In Elizabeth Cinkus v. Diamond Restaurant (Oct. 23, 1980) the complainant was not considered for a job as a chef because of her sex. Prof. Ian Hunter found that a breach of s. 4 of the Code had occurred.

With respect to the matter of compensation, Prof. Hunter stated:

> Insofar as possible, the order of the Board should attempt to put the complainant in the position she would have been in but for the illegal discriminatory act.

Since Mrs. Cinkus was unemployed for four months, she could be compensated for the salary lost during that time. However, the evidence showed that even if she had been hired, she would have been let go after five weeks on the return of the regular chef. As such, the Board ordered the respondent to pay $1,200.00 to the complainant for lost wages for those five weeks only.

Citing the Betty-Ann Shack case, Prof. Hunter also permitted an award of general damages: $150.00 for "injury to dignity". With respect to the usual administrative remedies such as a letter of assurance to the Commission, the posting of Commission cards, and notification of employment vacancies, Prof. Hunter stated: "... I decline to include any of these terms since I regard them all as offensive to the respondent's individual liberty" (p. 10). He merely ordered that the respondent notify the Chairman of the Commission when compliance had been effected.

There are several helpful British Columbia cases dealing with sexual discrimination and the remedies flowing therefrom.

In Jean Tharp v. Lornex Mining (Sept. 18, 1975) the complainant had been denied accommodation at her work site, whereas males in a like position were afforded such accommodation. She was subsequently given accommodation at a cost, but male employees were given free housing. Further, her accommodation was unsatisfactory in that she had to share facilities with male co-workers.

A three person Board of Inquiry found that there had been a breach of s. 8(1) of the B. C. Human Rights Code R.S.B.C. 1979, c. 186. The Board, under s. 17(2)(c) of the Code, found that it may award aggravated damages where the person contravening the Code did so "knowingly or with a wanton disregard" and if "the person discriminated against suffered aggravated damages in respect of her feelings or self-respect" (p. 15). Here, the complainant was awarded $250.00 in general damages, and $263.50 in special damages for the expenses she incurred in seeking alternative accommodation.

In Diane Borho v. Atco Lumber (Apr. 30, 1976), the complainant had applied for the position of fork-lift driver at the respondent company. She was not given the position. The Board of Inquiry found that the complainant had been given a test of her ability to operate a fork-lift without prior warning, and that the respondent generally did not take the complainant's application seriously because of her sex.

Since the complainant did not have the requisite skills to be hired, and the respondent was under no obligation to train her, the Board awarded her no general damages. Rather, the Board ordered the respondent to compensate the complainant for her expenses and lost wages in bringing the claim, and to treat male and female applicants alike in the future.

Where a complainant was found to have been dismissed because she was pregnant, a Board of Inquiry held that a breach of the B.C. Human Rights Code had occurred: H.W. v. Riviera Reservations (July 22, 1976).

Even though the complainant's incompetency was also a reason for the dismissal, it was found that pregnancy was the "effective cause". The Board held that pregnancy is not a "reasonable cause" for discrimination under s. 8 of the Code.

After the complainant was dismissed, she was able to find another job immediately, but it lasted only six weeks. The Board decided that the complainant was obliged to mitigate her losses, and that her misfortune in losing her other job shouldn't be borne by the respondent:

> Where the employee demonstrates that he can obtain no employment at all subsequent to wrongful dismissal, the employer is liable only for a reasonable period of search (p.10).

The Board awarded the complainant $40.00 in damages to cover her costs of attending the hearing. The Board also ordered the respondent to cease its contravention of the Code.

In Mae Loraine Warren v. Creditel Ltd. (Sept., 1976) the complainant was fired after being hospitalized for a serious operation. The male employees who replaced her in the collection sales office were paid at a higher rate than she was paid.

The Board found that a breach of s. 6(1) of the Code had occurred in that the respondents had paid the female complainant a lesser wage than male workers in the same position. Further, a breach of s. 8(1) of the Code had occurred since the complainant had been dismissed without reasonable cause i.e. on grounds of sex.

The Board ordered that the respondent pay the complainant an increased wage retroactive to 10 days prior to her dismissal in lieu of having received notice thereof. Further, the Board awarded the complainant $1,000.00 damages for "loss of personal reputation and self-esteem" (p. 4).

Where a Board of Inquiry found that female police clerks were being paid less than male guard/dispatchers for similar duties, it ordered the respondent to cease contravening the Code (s. 6), and to pay the appropriate difference in salary to the complainants: Davies v. District of Abbotsford (Feb. 18, 1977).

In Jane Gawne v. Chapman and Associates (Feb. 12, 1979), the complainant alleged that the respondent failed to hire her as a chainperson for survey work because of her sex. The Board of Inquiry (Beverly McLachlin) found that the respondent had discriminated against the complainant without reasonable cause. The Board ordered payment of $280.00 to the complainant, which sum represented the equivalent of 10 days wages had she been hired for the position. The complainant was also awarded $500.00 in respect of her costs.

In Janice Lynn Foster v. B.C. Forest Products (Apr. 17, 1979) the complainant applied for a labouring job at the respondent's mill. Even though there were open positions, the complainant was not hired.

The Board (Prof. James MacPherson) found that the complainant was not hired because of her height: she was 5 feet tall. Prof. MacPherson stated that under the circumstances,

discrimination on the basis of the complainant's size was not reasonable. Hence, a breach of s. 8 of the Code had occurred.

Further, citing the Ontario decision of Colfer, supra, the Board found that the respondent's height and weight requirements had the effect of discriminating against women. The respondent generally gave preference to persons 5 ft. 6 in. and 140 lbs., or more, and thus, men had an employment advantage over women.

Prof. MacPherson ordered the respondent to cease its discrimination. With respect to the individual complainant, the Board did not order that any damages be paid. Since the respondent had a very high turnover of employees, it was difficult to tell how long the complainant would have remained at the job had she been hired. Thus, the respondent was ordered merely to require the employer to hire the complainant as a full-time employee. Prof. MacPherson's decision was upheld on appeal to the Supreme Court of British Columbia (Oct. 9, 1979).

Several recent sex discrimination cases have been decided in Alberta.

In Gares v. Royal Alexandra Hospital (Sept. 27, 1974) female nurses' aides at the respondent hospital alleged that they were paid less for work similar to that carried out by male orderlies. The wages for the male orderlies and the female aides were negotiated by separate unions. The Board (Prof. Frederick Laux) rejected though, the argument that differing bargaining strengths of the respective unions made the wage differential legitimate:

> Bargaining strength, whether brought about by market conditions, collective bargaining process or otherwise is not a factor. It it were, the whole purpose of section 5 would be defeated because females simply have not had the bargaining strength to compete with males in the struggle for the financial fruits of their labour. Section 5 is designed to accomplish the very thing that females have been unable to do at the bargaining table. (p. 34).

Thus, a breach of section 5 of the Individual Rights Protection Act. A. S. 1972, c. 2 was found to have occurred.

Prof. Laux ordered the respondent to increase the nurses aides' salaries retroactive to the most recent collective agreement. On appeal, this decision was upheld, although the date of retroactivity was altered: (1976), 67 D.L.R. (3d) 635.

Where a female janitor was paid $1.90/hr. and a male janitor was paid $2.50/hr. for the same work, a Board of Inquiry (Mary McCormick Hetherington) recommended that the complainant receive a retroactive pay increase to the date of her employment: Linda Lowe v. Scot Young Ltd. (Sept. 15, 1975). The complainant also was awarded the amount of her expense in bringing the claim.

In a case similar to the Gares case, a complaint was brought on behalf of nurses' aides alleging discrimination in being paid a wage lower than male orderlies: Civil Service Association v. Foothills General Hospital (June 30, 1977). The Board (Mr. John Hill) found that indeed the nurses' aides performed work substantially the same as the orderlies and so a violation of s. 20 of the Individual Rights Protection Act had occurred.

The Board awarded the complainants a pay increase retroactive to the date of the complaint, plus interest.

In Shandrowski v. Alberta Motor Association Insurance Ltd. (Dec. 29, 1978), complaints were lodged by various individuals against their respective insurance companies. The nature of the complaints was that an insured's premiums would be lower if he were female, or alternatively, that a holder of an annuity would receive a greater amount if she were male.

The Board of Inquiry (Mr. Frank D. Jones, Q.C.) found that these insurance practices in fact amounted to discrimination on the basis of sex. No monetary compensation was awarded to the complainants though. Rather, Mr. Jones recommended that an inquiry be held to amend the provisions of the Alberta Insurance Act R.S.A. 1970, c. 187.

In a case where a female cabinet maker was paid less than male employees doing the same work, a Board of Inquiry recommended that the complainant receive a retroactive pay increase: My Lipton v. Sava Furniture (July 11, 1979). The Board (Mr. R. T. G. McBain Q. C.) further ordered that the respondent cease its discriminatory practices.

There are a number of cases involving sexual discrimination decided by Boards of Inquiry in Saskatchewan. Many of the decisions concern situations where female workers were paid less than male workers.

In Department of Labour v. University of Regina (Sept. 8, 1975), it was found that female cleaners were paid less than male caretakers for similar work. The Board of Inquiry (Judge Tillie Taylor) ordered the respondents to pay the differential back pay owed to the complainants, and to continue to pay female cleaners the same rate as male caretakers. This decision was upheld on appeal to the Court of Queen's Bench, October 28, 1975.

Similarly, in Department of Labour v. Yorkton Regional High School (March 30, 1976) a breach of s. 41(1) of the Saskatchewan Labour Standards Act S.S. 1969, c. 24 was found to have occurred where female cleaners were paid less than a male caretaker. The duties performed by the cleaners was found to be "similar work performed under similar working conditions in the same establishment, the performance of which requires similar skill, effort and responsibility" (p. 6).

The Board (Taylor, J.) ordered the respondent to pay a retroactive wage increase to the complainants, from the date of the hiring of the male caretaker.

In Gail Oliver v. Saskatchewan Department of Highways (Nov. 5, 1976), it was found that the respondent failed to properly consider the complainant's application for a position as a Maintenance Worker because of her sex.

The Board (Judge Tillie Taylor) ordered that the complainant be given an opportunity to apply for the first

available position. Also, it was ordered that the respondent notify both the complainant and the Saskatchewan Human Rights Commission of employment openings for a one year period.

In another case where it was found that female employees were paid less than males for similar work, Taylor J. ordered the respondent to pay the complainants a retroactive pay increase: Department of Labour v. Simpson - Sears (May 4, 1977). There, female sales clerks were being paid less than males. Thus, s. 41(1) of the Saskatchewan Labour Standards Act had been violated.

On appeal to the Court of Queen's Bench (Aug. 3, 1977), MacDonald, J. upheld the decision, though the date to which the pay increase was to be extended was altered.

Likewise, in Department of Labour v. S.S. Kresge Co. Ltd. (Jan. 27, 1978), where female sales clerks were paid less than males, Taylor J. ordered the respondents to pay a retroactive pay increase to the complainants.

In Jo-Ann Booth v. Frame and Wheel Allignment Ltd. (Aug. 6, 1980), the complainant was paid less as a painter than males doing the same work. A three person Board could not find that the wage differential was founded on any seniority or merit system. Thus, a violation of the Labour Standards Act was held to have occurred. The complainant was awarded a retroactive pay increase to bring her wage up to that of male workers.

In Quebec, a judge found that a 14 year old girl was discriminated against in not being permitted to play goalie on an otherwise all-boy team: Francoise Turbide v. La Federation Quebecoise de Hockey sur Glace (Nov. 15, 1978). The complainant had been told by the respondent that her team would be disqualified if she continued to play. Meyer, J. found that the complainant would not be in danger, nor would endanger other players, by her participation on the team. Thus, the disqualification was unnecessary and was a violation of s. 10 of the Charte des droits et libertes de la personne S. Q. 1975, c. 6.

The Chairman ordered that the respondent cease its discriminatory policy and permit the complainant to continue playing. Damages were awaded in the amounts of $131.00 to the complainant's father for expenses in bringing the claim and $300.00 to the complainant as general damages.

In Larouche v. Emergency Car Rental (June 13, 1980) the respondent refused to rent a 16 ft. truck to the complainant, because it doubted that a woman could drive it. In fact, the complainant had experience with such vehicles.

The Chairman (Yves Laurier, J.), found that the respondent's doubt was not founded on any factual knowledge of the complainant's capacity to drive the truck. Indeed, the respondent rented the truck to the complainant's male friend without asking if he had any experience driving large trucks.

Thus, the Chairman found that a claim under s. 10 of the Charte des droits had been made out. He awarded the complainant damages for her loss of time ($44.00) and her personal injury ($100.00). Further, the Chairman stated:

> En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur à des dommages exemplaires. (p. 2)

An additional $75.00 was awarded as exemplary damages.

In New Brunswick, a number of cases have been decided on the issue of sexual discrimination.

Where a complainant was refused consideration as a candidate for a job as a cost accountant trainee, a five person Board of Inquiry found that she was discriminated against on the basis of sex: Elaine Stairs v. Maritime Cooperative Services (Apr. 28, 1975).

The Board ordered the respondent to pay $150.00 to the complainant for her "embarassment and humiliation". Further, the Board ordered that the respondent send a letter of assurance of its compliance with the law, and give notice to the same effect to its employees. Also, the Board required that the respondent post the preamble of the New Brunswick Human Rights Act R.S.N.B. 1973, c. H-11 on its premises, send a letter of apology to the complainant, and submit copies of its employment advertisements to the Human Rights Commission.

In Jacqueline MacBean v. Village of Plaster Rock (Nov. 17, 1975) it was found that four women and six men applied for the position of Clerk-Treasurer of the respondent village. No women, including the complainant, received an interview.

The Board of Inquiry (Robert Kerr) found the complainant to be as well, or better qualified as the male applicants given interviews. As such, the respondent was held to have violated s. 3 (1) of the Human Rights Code. The Board awarded the complainant no damages, but did order the respondent to send a letter of apology to the complainant, to send a letter of assurance of compliance wiht the Code to the Commission, to post a notice of such compliance to its employees, to post a preamble of the Code on its premises, and to submit copies of employment advertisements to the Commission for its prior approval.

When a female employee was dismissed from employment at a liquor store, a Board of Inquiry (Robert Kerr) found that a violation of the Code had taken place as the respondent wished to restrict the number of its female full-time employees: Shirley Naugler v. N. B. Liquor Corp. (June 7, 1976).

The Board also found that the respondent discriminated against the complainant during the course of her employment by requiring her to perform such duties as operating the cash register and cleaning up, duties that male employees were not required to carry out.

Since the complainant would have been laid off, and called back as a casual employee anyway, the Board awarded damages accordingly. That is, consideration was given to the number of hours the complainant would have worked had she not been improperly dismissed. A reduction of 20% was then imposed for the complainant's failure to mitigate her losses.

Further, the Board ordered that the complainant be reinstated in her position within one week of the decision. The respondent was to report any disciplinary action taken with respect to the complainant to the Commission.

Other orders included a requirement that the respondent report its efforts to eliminate discriminatory work assignments to the Commission, that the respondent send a letter of assurance of its compliance with the Code to the Commission, and post the preamble of the Code on its premises.

In Joan Bulger v. Royal Canadian Legion (March 6, 1978), the complainant worked part-time as an office clerk at the respondent's premises. She then began to work as a doorman in order to relieve other employees. Although her work was satisfactory, the president of the legion ordered that she be dismissed, stating that the position was "no place for a woman".

The Board found that a violation of s. 3(1) of the Code had occurred and ordered that the complainant be reinstated with seniority over employees hired since her dismissal. She was to be treated in the future in the same manner as other

employees. The respondent was required to give notice of any disciplinary action taken with respect to the complainant to the Commission for three months.

In a Nova Scotia decision similar to that in Quebec (Turbide, supra), a Board of Inquiry (R. E. Kimball) found that a girl was discriminated against (per: s. 11A of the Nova Scotia Human Rights Act C.S.N.S. 1979, c. H-24) in not being able to participate in a minor hockey league: Tina Forbes v. Yarmouth Minor Hockey Association (Oct. 27, 1978).

The Board ordered that the complainant be permitted to register in the respondent association.

In Donald Berry v. The Manor Inn (Aug. 19, 1980) the complainant alleged that he was discriminated against in being dismissed from his job as a bartender/doorman/waiter in a lounge area of the respondent inn. The respondent's argument was that its preference for female lounge employees could be defended as a bona fide occupational qualification, since customers also preferred female employees. As such, the respondent would suffer an economic loss by hiring males.

The Board rejected this argument stating that such a test would essentially be one based on community standards, but would not advance the aims of the Nova Scotia Human Rights Act.

The Board found that the complainant rejected alternative employment in the respondent inn. Thus, it based its damage award on the reduced rate of pay that the complainant would have received in that alternative employment had he accepted the position. A further $100.00 was awarded for the complainant's humiliation.

In summary, the compensation and remedies awarded to successful complainants in sexual discrimination cases seem to be four basic types: (1) exemplary damages; (2) general damages; (3) special damages; and (4) functional remedies.

(1) Exemplary Damages: These have only been awarded in two cases where the Boards felt that the respondent's discrimination was particularly deliberate or wanton: Jean Tharp; Larouche. Even so, the amounts were modest ($250.00 and $75.00 respectively).

(2) General Damages: These have been awarded by Boards quite frequently to compensate victims for psychological suffering resulting from discrimination. The amounts given to complainants vary greatly (for eg., $75.00 in Segrave; $8,000.00 in Hendry,) but generally are not more than one or two hundred dollars.

(3) Special Damages: These are awarded by Boards to compensate complainants for the actual out-of-pocket loss because of the discriminatory action taken against them. For example, in cases where it is found that female employees were

paid less than males, Boards typically award a retroactive pay increase to the complainants (Gares; Fortey, for eg.)

Similarly, where a complainant is denied employment because of her sex, Boards have awarded amounts representing lost wages (Cinkus; Hendry; Gawne).

(4) Functional Remedies: In certain cases Boards have ordered that a discriminatory act be corrected rather than, or in addition to giving a monetary award. For example, in Colfer, I ordered that the complainant be properly considered as an applicant by the respondent police commission. Similarly, in Janice Lynn Foster Prof. MacPherson ordered that the respondent mill employ the complainant.

Other examples include orders requiring future compliance with Human Rights legislation (Segrave; Robertson).

In some cases, especially in Ontario and New Brunswick, Boards have required respondents to carry out certain acts in order to impress upon them the importance of compliance and the severity of violations. Such acts include the sending to Commissions of letters expressing respondents' willingness to comply with legislation, sending letters of apology to complainants, posting notices of compliance, etc. (Shack; Boyd; Robertson; MacBean; Naugler). In one case, a Board (Prof. Ian Hunter) found such remedies to be repugnant: Cinkus.

Remedy

It was submitted in argument that if I found for the Complainant, then if she could pass the objective test administered to applicants for the position of police constable, and given her other qualifications, I should order that she be hired as a police constable, and as soon as the next position becomes available. This would make it unnecessary for an interview. Given the history of this matter, I must say I am doubtful that Ms. Hartling can receive a fair interview that would assess her candidacy on the merits. The Chief has testified he did not hire her on the merits, and it is questionable whether he or other senior officers could do the interview objectively in the face of this position. Finally, if she is interviewed at this point, and honestly rejected on the merits, fairness will not be seen to be done as she will have been rejected by a Chief who previously rejected her simply because she was a female. On the other hand, the interview stage is an integral element to the hiring process, and I do not think this Tribunal should substitute its decision (if such were the decision) for that of the Board of Police Commissioners (and the Chief) as to who should be hired as a police constable in the City of Timmins. As well, I think a comprehensive interview is an integral, indeed, critical element before anyone could make such a decision to hire. If Ms. Hartling passes the test, she should only be hired if she also meets the standards as determined by an interview. Should Ms. Hartling wish to pursue an application to be a police

constable, I have tried to give the process with respect to her application some greater objectivity through the manner of the order I am making.

There is some evidence of lost wages, and a period of unemployment, but also it is uncertain that Ms. Hartling would have been hired as a police constable if she had been assessed objectively on her merits.

All in all, Ms. Hartling has suffered hurt feelings, considerable anguish and public embarassment, given the arbitrary, discriminatory treatment she received in seeking employment with the City of Timmins police force. If she is successful in pursuing her application at this point, she will have lost some two years in her chosen career. If she chooses not to pursue her application at this point, or does so but is unsuccessful in being offered a position, she will always be left with the uncertainty as to whether she could have achieved her ambition of being a police constable with the Timmins police force if her application in 1978 had been dealt with objectively and fairly on its merits and she had not been discriminated against because she is a female.

ORDER

For the foregoing reasons, this Board of Inquiry orders the following:

1. It is ordered that the Respondents, the Board of Commissioners of Police, City of Timmins, and Chief Floyd

Schwantz, cease to contravene section 4 of the Ontario Human Rights Code, and that the Respondents henceforth recruit all prospective employees for the position of police constables without regard to the sex of the applicant.

2. It is ordered that the Respondents shall give the Complainant the opportunity forthwith of taking the standard test administered normally to applicants for the position of police constable with the City of Timmins police force prior to the interview stage in the hiring process, and if she satisfactorily passes that test then she shall proceed to the interview stage, but the interview shall include as well as the usual interviewing officers the members of the present Board of Police Commissioners of the City of Timmins.

3. It is ordered that if Ms. Hartling satisfactorily passes the interview stage in becoming a constable and otherwise meets all the usual qualifications such that she would be offered a position if one were available, then she shall be offered the first position of constable that becomes available. In all events, the Board of Police Commissioners shall report to the Ontario Human Rights Commission the result of the above process with respect to Ms. Hartling's application, together with the reasons in detail for her application being rejected, if it is ultimately rejected.

4. It is ordered that the Respondents are jointly and severally liable to the Complainant for general damages, which I fix at three thousand ($3,000.00) dollars, which sum

the Respondents shall pay to the Complainant forthwith.

Dated at Toronto this 22nd day of June, 1981,

Peter A. Cumming
Board of Inquiry